

¹ 47 C.F.R. §§ 1.903(a), 1.947(a), and 74.532(e).

the location of the STL. The Southern representative stated that the studio and STL moved from the 1510 North White Sands Boulevard location on February 16, 2007. When the inspection was completed, the agent reviewed the violation with Southern's owner. The station owner acknowledged the licensing error and Southern's failure to include the STL transmitter location change when they applied for an STA for the parent broadcast station, KUPR. The station owner stated that he would start paperwork immediately to make the changes for WPXT310.

5. On March 28, 2007, the agent returned to the studio location of 3001 North Florida Avenue and observed that WPXT310 was still operating from that location.

6. On April 18, 2007, a review of the Commission's databases revealed no modification application on file for WPXT310. In a fax stamped with the date of April 21, 2007, Southern's owner sent the Denver agent information concerning the necessary modifications that were to be made: a change of address request to the FCC and an application for a "simplex auxiliary broadcast STL microwave path" sent to a frequency coordination company.

7. On September 4, 2007, a review of the Commission's databases revealed no modification application on file for WPXT310.

8. On September 11, 2007, the Denver Office issued a *NAL* in the amount of \$4,000 to Southern.² In the *NAL*, the Denver Office found that Southern apparently willfully and repeatedly violated Sections 1.903(a), 1.947(a), and 74.532(e) of the Rules by failing to operate station WPXT310 from its licensed location. Southern filed a response ("*Response*") to the *NAL* on October 11, 2007, and supplemented its response on March 19, 2008, and April 11, 2008. In its *Response*, Southern argues that it displays a high level of public service, which should mitigate the forfeiture, that the statutory factors requires reduction of the forfeiture, that the fine is disproportionate to the nature of the offense, and that Southern does not have the ability to pay the forfeiture.

III. DISCUSSION

9. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,³ Section 1.80 of the Rules,⁴ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁵ In examining the *Response*, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁶

10. Section 1.903(a) of the Rules requires that stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service and with a valid authorization granted by the Commission.⁷ Section 1.947(a) of the Rules requires that all major

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200732800009 (Enf. Bur., Western Region, Denver Office, released September 11, 2007).

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

⁶ 47 U.S.C. § 503(b)(2)(E).

⁷ 47 C.F.R. § 1.903(a).

modifications as defined in Section 1.929 of the Rules require prior Commission approval.⁸ Section 1.929(d)(1)(i) of the Rules defines one of the major actions as "any change in transmit antenna location by more than 5 seconds in latitude or longitude for fixed point-to-point facilities."⁹ Section 74.532(e) of the Rules states that each aural broadcast auxiliary station will be licensed at a specified transmitter location to communicate with a specified receiving location, and the direction of the main radiation lobe of the transmitting antenna will be a term of the station authorization.¹⁰ At the time of the inspection on March 27, 2007, Southern was found operating station WPXT310 from a location inconsistent with the station's authorized coordinates and "fixed address location." The distance separating the point of operation from that of the license was greater than 1 mile (approximately 74 seconds of latitude and 25 seconds of longitude).

11. In its *Response*, Southern does not dispute the facts recited in the *NAL*. Instead it argues that its station KUPR, Alamogordo, New Mexico, which WPXT310 is the STL for, displays an extraordinary level of public service, which supports mitigation of the forfeiture. We applaud Southern's efforts, however, they are not a basis for reduction of the forfeiture. The Commission has consistently held that "licensees are expected to comply with the Commission's Rules as well as to make continued efforts to serve the community to which they are licensed and will not be relived of liability for violations of the Rules by the fact they have fulfilled their responsibility to serve their communities."¹¹ Additionally, "a licensee is not relieved of responsibility for complying with applicable statutes and rules by the fact that it has performed an outstanding public service to the community."¹² Therefore, we decline to mitigate the proposed forfeiture based on Southern's public service record.

12. Southern also argues that the statutory factors require reduction of the forfeiture, including its excellent record of public service, along with the fact that no interference was caused by Southern's operation of WPXT310 at an unauthorized location. We have discussed the relevance of Southern's public service record above. We note that the Denver Office found that Southern was apparently liable for operating from an unauthorized location, not for causing interference by operating WPXT310. Additionally, it is well established that the absence of public harm is not considered a mitigating factor in a rule violation and does not warrant a downward adjustment of a forfeiture.¹³ Therefore we find no merit to this argument.

13. Southern also argues that broadcasters utilizing auxiliary services such as STL's are entitled to a "free" amount of unlicensed auxiliary use, and that operators of such stations should be given greater flexibility to serve the needs of the public. While we acknowledge that Section 74.24(d) of the Rules allows an STL station short-term operation under the authority conveyed by a part 73 license or a broadcast auxiliary license without prior FCC authorization, not to exceed 720 hours annually,¹⁴ this rule does not mitigate Southern's violation. At the time of the inspection, the Denver agent was told by the

⁸ 47 C.F.R. § 1.947(a).

⁹ 47 C.F.R. § 1.929(d)(1)(i).

¹⁰ 47 C.F.R. § 74.532(e).

¹¹ *Radio Beaumont, Inc.*, 50 FCC 2d 904 (1975). See also *Garvin County Broadcasting, Inc.*, 46 FCC 2d 954 (1974).

¹² *Esther Blodgett*, 18 FCC 2d 6 (1969). See also *Folkways Broadcasting Co.*, 12 FCC 2d 887 (1968).

¹³ *Pacific Western Broadcasters*, 50 FCC 2d 819 (1975).

¹⁴ 47 C.F.R. § 74.24(d).

owner of WPXT310 that the station had been operating from the unauthorized location for more than a month, therefore, more than 720 hours. Six months after the inspection, a review of the Commission's databases revealed that, on September 4, 2007, Southern had still failed to file an application with the Commission to modify the WPXT310 license. Additionally, despite Southern's assurance, in its October 11, 2007 *Response*, that the "oversight is being rectified," we note that Southern did not file an application with the Commission to modify the WPXT310 license until April 22, 2008.¹⁵ Consequently, we find unavailing Southern's argument that the \$4,000 amount proposed by the Denver Office, which is the base forfeiture amount for operation at an unauthorized location,¹⁶ is disproportionate to the offense.

14. Southern also argues that it does not have the ability to pay the proposed forfeiture amount. To support this claim, Southern supplied financial data for the three years prior to the *NAL*.¹⁷ In analyzing a financial hardship claim, the Commission generally has looked to gross revenues as a reasonable and appropriate yardstick in determining whether a licensee is able to pay the assessed forfeiture.¹⁸ We have reviewed the data supplied by Southern and we conclude that reduction of the forfeiture from \$4,000 to \$800 is warranted.¹⁹

15. We have examined the *Response* to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Southern willfully and repeatedly violated Sections 1.903(a), 1.947(a), and 74.532(e) of the Rules. Considering the entire record and the factors listed above, we find that reduction of the proposed forfeiture to \$800 is warranted.

IV. ORDERING CLAUSES

16. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Southern New Mexico Radio Foundation, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$800 for willfully and repeatedly violating Sections 1.903(a), 1.947(a), and 74.532(e) of the Rules.²⁰

17. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²¹ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the

¹⁵ See File No. 0003407558, received April 22, 2008. We note that the location proposed in the modification application for WPXT310 is 3049 North Florida Avenue, Alamogordo, New Mexico, as opposed to 3001 North Florida Avenue.

¹⁶ See 47 C.F.R. § 1.80(b)(4).

¹⁷ *Forfeiture Policy Statement*, 12 FCC Rcd at 17107 (the Commission has the flexibility to consider any documentation, not just audited financial statements, that it considers probative, objective evidence of the violator's ability to pay a forfeiture).

¹⁸ See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992).

¹⁹ See *PJB Communications*, 7 FCC Rcd at 2089 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues).

²⁰ 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 1.903(a), 1.947(a), 74.532(e).

²¹ 47 U.S.C. § 504(a).

Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

18. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Southern New Mexico Radio Foundation, at its address of record, and Barry Wood, its counsel of record.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau